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No. 87-969

In the Supreme Court of the United States

OCTOBER TERM, 1987

GUIDO IMPEMBA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's due process rights were violated by the admission of the testimony of an informant who was promised a fee contingent on the government's evaluation of his overall performance at the conclusion of the case.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-41a) is reported at 825 F.2d 538.

JURISDICTION

The judgment of the court of appeals was entered on July 23, 1987. A petition for rehearing was denied on September 18, 1987 (Pet. App. 42a). The petition for a writ of certiorari was not filed until December 12, 1987, and is therefore substantially out of time under Rule 20.1 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Maine, petitioner was convicted of con-

spiracy to possess marijuana with intent to distribute it (Count 1) and conspiracy to import more than 1,000 pounds of marijuana (Count 2), in violation of 21 U.S.C. 846 and 963. He was given concurrent sentences of 15 years' imprisonment and a $50,000 fine on Count 1, and five years' imprisonment and a $15,000 fine on Count 2. The court of appeals affirmed (Pet. App. 1a-41a).

1. The evidence, the sufficiency of which is not challenged, was summarized by the court of appeals (Pet. App. 4a-11a). In 1982, informant Jose Montaner delivered money from co-defendant Ernesto Agudelo to a Colombian boat captain and brokered Agudelo's purchase of an ocean-going vessel to be used for drug smuggling. Agudelo subsequently included Montaner in a plan to smuggle approximately 62,000 pounds of marijuana on board the freighter ADINA from Colombia to the northeast coast of the United States. After making the necessary arrangements in Colombia and Panama, Montaner and Agudelo returned separately to the United States, met in Florida, and traveled together to Boston. They took with them a portable radio to be used to communicate with their marijuana suppliers in Colombia. Pet. App. 4a-5a.

Montaner and Agudelo then went to petitioner's rented house near Laconia, New Hampshire. At that location, Agudelo, Montaner, petitioner, and others made plans for the arrival and offloading of the ADINA. At one point, petitioner and others met with the persons who had been chosen to offload the vessel. Petitioner gave Agudelo between $5,000 and $10,000 in cash at that time and taught Agudelo how to make long distance telephone calls that could not be traced. According to Agudelo, petitioner represented the persons who would be buying the marijuana shipment. Pet. App. 5a-6a.

In late November 1983, Agudelo learned from his Colombian supplier that the arrival of the ADINA was immi-

nent. According to the plan, a smaller vessel was to meet the ADINA 200 to 300 miles from the coast and bring the marijuana ashore in Maine. Agudelo told Montaner that code names and special radio frequencies had been assigned to the various vessels and personnel; Montaner relayed this information to government agents, who began to monitor the group's radio transmissions. Pet. App. 6a-7a.

The ADINA's arrival was delayed because of bad weather. On December 6, 1983, the Coast Guard began tracking the ADINA in the Gulf of Maine. Two days later, a Maine fisherman reported to federal agents that he had been asked to provide a fishing vessel to offload marijuana from a freighter located at coordinates in the Gulf of Maine where the agents knew the ADINA to be. Pet. App. 7a, 9a-10a.

On December 9, the Coast Guard boarded the ADINA and discovered a large quantity of marijuana hidden in the ship's cargo holds. At the captain's request, the Coast Guard personnel left the ADINA until permission was received from the government of Panama to seize the ship, which was registered in Panama. In the meantime, the Coast Guard jammed the freighter's radio transmissions to prevent persons on the ship from contacting their cohorts on shore. Federal agents thereafter manned a decoy fishing boat that proceeded to the designated rendezvous site on the Maine coast. Petitioner and other conspirators were arrested at a hotel near the offloading site, and numerous weapons were seized. Pet. App. 10a-11a.

2. Prior to trial, it was disclosed that Montaner had received payments in connection with his investigative work in this case (see Pet. App. 12a, 17a-18a). As was revealed in the discovery materials that were provided to the defense, Montaner received approximately $17,000 in payments prior to trial for information he provided with respect to this case. In addition, he received $36,000 under the Witness Protection Program in the form of subsistence

and relocation expenses. Montaner also expected to receive a payment of up to $50,000 from the sale of the ADINA, which had been forfeited as a result of information provided by Montaner.[1] Finally, the discovery materials revealed that Montaner had previously received $30,000 for his cooperation in an unrelated case.

Although there was no written agreement memorializing the arrangement between Montaner and the government, the contents of the oral arrangement with Montaner were explored in detail at trial. As the agents testified, the amount that Montaner would receive as compensation was primarily dependent upon the nature and extent of his cooperation in the investigation (Pet. App. 17a). Montaner likewise testified, for the most part, that his compensation was not dependent on the outcome of the case (see *id.* at 37a-39a). At one point during cross-examination, however, Montaner stated that that he would expect more generous treatment if the case resulted in convictions (*id.* at 17a-18a).

3. The court of appeals rejected petitioner's claim that Montaner's cooperation arrangement with the government violated petitioner's Fifth and Sixth Amendment rights. As the court noted, "[a] contingent fee agreement is not per se impermissible," so long as "established safeguards" are followed to ensure the veracity of the witness (Pet. App. 13a). In this case, the court found (*id.* at 15a (footnote omitted)):

> The extent of the corroboration of Montaner's testimony, plus the fact that the jury was fully informed of the nature of the agreement, the thorough cross-examination about the agreement, and the spe-

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[1] Under customs law, informants may be paid a "moiety" of 25% of the proceeds realized from the sale of forfeited items, up to a maximum of $50,000 (Pet. App. 12a n.3).

cific instructions admonishing the jury to weigh the accomplice's testimony with care, are sufficient safeguards to outweigh the risk of inducing perjury that is present in any contingency fee agreement and ensure that the defendants were not denied their right to a fair trial.

The court of appeals did not find it necessary to consider whether a different rule should apply if an informant's compensation were contingent upon the outcome of a case since, in the court's view, no such contingency was present in this case (Pet. App. 17a). Despite Montaner's "isolated statement on cross-examination that he expected more generous treatment from the government if the defendants were convicted," the court noted that (1) the agents' consistent testimony and the thrust of Montaner's testimony considered in its entirety showed that no such contingency existed; (2) "Montaner received the bulk of his compensation prior to trial"; and (3) Montaner had been rewarded in a previous investigation even though there had not been any arrests or convictions (*id.* at 17a-18a). The court therefore concluded that there was "no reason * * * for Montaner to believe his payment in *this* case would be contingent upon a conviction, nor was it" (*id.* at 17a (emphasis in original)).

Judges Aldrich and Wisdom concurred in the result. They noted that the court of appeals, in *United States* v. *Dailey*, 759 F.2d 192 (1st Cir. 1985), had questioned whether the government would ever be justified in promising a benefit contingent upon a conviction in a particular case and that *Dailey* imposed upon the government the duty of ensuring that both parties understood the exact terms of the contingent agreement (Pet. App. 40a). As Judge Aldrich noted, however, the concerns expressed by the court in *Dailey* were satisfied in this case, because "the

record shows that Montaner did not really believe that a conviction would increase his receipts" (*id.* at 41a).

ARGUMENT

Petitioner does not allege that Montaner's testimony was false or that he was denied his right to cross-examine Montaner and the agents fully concerning the terms of the contingent fee arrangement. Rather, petitioner contends (Pet. 4-7) that Montaner's testimony should have been excluded because of Montaner's arrangement with the government. He argues that the decision of the court of appeals is in conflict with that court's own prior ruling in *United States* v. *Dailey, supra*, in that the instant arrangement was not reduced to writing to ensure that the payment of fees was not contingent upon the conviction of any defendant. The question whether there is an intra-circuit conflict between the decision below and the decision in *Dailey*, however, is not one that warrants review by this Court. See *Wisniewski* v. *United States*, 353 U.S. 901 (1957).

In any event, both this Court and the courts of appeals have uniformly agreed that testimony obtained in exchange for a promise of favorable treatment is admissible; as this Court has explained, "[t]he established safeguards of the Anglo-American legal system leave the veracity of a witness to be tested by cross-examination, and the credibility of his testimony to be determined by a properly instructed jury." *Hoffa* v. *United States*, 385 U.S. 293, 311 (1966); see also *Lisenba* v. *California*, 314 U.S. 219, 227 (1941); *Benson* v. *United States*, 146 U.S. 325, 334-337 (1892); *United States* v. *Murphy*, 41 U.S. (16 Pet.) 203 (1842) (owner of stolen goods was a competent witness despite his eligibility to receive a portion of the fine on conviction); *United States* v. *D'Antignac*, 628 F.2d 428, 435-436 (5th Cir. 1980), cert. denied, 450 U.S. 967 (1981);

United States v. *Mills*, 597 F.2d 693, 697 (9th Cir. 1979); *United States* v. *Librach*, 536 F.2d 1228, 1230 (8th Cir.), cert. denied, 429 U.S. 939 (1976); *United States* v. *Curtis*, 520 F.2d 1300, 1304 (1st Cir. 1975); *United States* v. *Spivey*, 448 F.2d 390, 391 (4th Cir. 1971), cert. denied, 405 U.S. 927 (1972); *United States* v. *Insana*, 423 F.2d 1165, 1168-1169 (2d Cir.), cert. denied, 400 U.S. 841 (1970).

In addition, the courts of appeals have uniformly held admissible the testimony of informant-witnesses who have received fees contingent on the value of their services. Although such fee arrangements may create an incentive to lie, the courts have recognized that "there are strong public policy justifications for permitting law enforcement officials to offer additional incentives to encourage citizens to come forward with knowledge of crimes." *United States* v. *Walker*, 720 F.2d 1527, 1540 (11th Cir. 1983), cert. denied, 465 U.S. 1108 (1984). Rather than excluding such testimony on a per se basis, the courts have found it preferable to "leave the entire matter to the jury to consider in weighing the credibility of the witness-informant." *United States* v. *Grimes*, 438 F.2d 391, 396 (6th Cir.), cert. denied, 402 U.S. 989 (1971); accord *United States* v. *Valona*, 834 F.2d 1334, 1343-1344 (7th Cir. 1987); *United States* v. *Cervantes-Pacheco*, 826 F.2d 310, 313-316 (5th Cir. 1987) (en banc), cert. denied, No. 87-656 (Jan. 19, 1988); *United States* v. *Spector*, 793 F.2d 932, 937 n.3 (8th Cir. 1986), cert. denied, No. 86-621 (Jan. 12, 1987); *United States* v. *Hodge*, 594 F.2d 1163, 1167 (7th Cir. 1979); *United States* v. *Jones*, 575 F.2d 81, 85-86 (6th Cir. 1978); *United States* v. *Reynoso-Ulloa*, 548 F.2d 1329, 1338 & n.19 (9th Cir. 1977), cert. denied, 436 U.S. 926 (1978); *United States* v. *Crim*, 340 F.2d 989 (4th Cir. 1965); see also *United States* v. *Waterman*, 732 F.2d 1527, 1533 (8th Cir. 1984) (en banc), cert. denied, 471 U.S. 1065 (1985).

The recent disposition of a similar claim by the en banc Fifth Circuit is instructive. In *United States* v. *Cervantes-Pacheco, supra*, an informant who periodically provided assistance in federal investigations received a substantial cash payment at the conclusion of the case based on an evaluation of his overall performance. Rejecting any "per se exclusionary rule," the court of appeals there held that "the credibility of the compensated witness * * * is for a properly instructed jury to determine" (826 F.2d at 316). Although the court recognized that such a contingent fee arrangement may well provide the compensated witness with a motivation to fabricate, "[a] witness * * * who is paid a fee for his services has less of an inducement to lie than witnesses who testify with promises of reduced sentences" (*id.* at 315). Moreover, the risk of fabrication is further reduced by the already "[a]dequate rules * * * in place to protect against abuses" in the form of discovery requirements, cross-examination, and cautionary jury instructions (*id.* at 315-316). Because of these substantial safeguards, the court in *Cervantes-Pacheco* correctly recognized that the kind of per se rule of exclusion urged by petitioner here has been "rejected * * * either expressly or in principle" both by this Court and by every other circuit that has considered the issue (*id.* at 313-314 & n.1 (collecting cases); *id.* at 316 (Rubin, J., concurring)).

There are no reasons for a different result here. As the court below stated, the substantial safeguards against perjured testimony that were relied upon in *Cervantes-Pacheco* "were adhered to in the instant case" (Pet. App. 14a). As the court of appeals noted (*ibid.* (footnote and citation omitted)):

> The full nature of rewards to Montaner was presented to the jury in the government's direct case, and was also explored extensively on cross-examination. Prior to trial, the government provided defense counsel

> with a written memorandum detailing all payments and benefits to Montaner. In the final instructions, the trial court gave the jury the appropriate standard against which to weigh the credibility of Montaner's testimony. * * * The jury was given the accomplice instruction on three occasions and was told to focus particularly on motives Montaner might have to lie, such as promises or benefits.

Moreover, as the court below further recognized, "the evidence here fully satisfies any suggested safeguard of corroboration" since the agents who "followed Montaner throughout his investigation * * * confirmed minute details of his testimony" and since "[o]ther accomplices who never met Montaner[] gave accounts of this conspiracy * * * that confirmed Montaner's testimony" (Pet. App. 15a). In such circumstances, the Due Process Clause was in no way offended by the admission of the testimony of a compensated witness.

Nor is there merit to petitioner's claim (Pet. 6) that this Court's intervention is required because the instant decision is "likely to generate further confusion among the other circuits" and is "directly at odds" with the First Circuit's own prior decision in *United States* v. *Dailey, supra*. As we have noted, the courts of appeals that have considered the issue are uniformly in agreement with the decision in this case. And, even apart from the inappropriateness of review by this Court to resolve an intra-circuit conflict, any difference between the decision below and the same court's decision in *Dailey* reflects only a matter of emphasis.

For example, petitioner complains that the court below, unlike its counterpart in *Dailey*, endorsed fee arrangements that are contingent upon the outcome of trial. Although the court below agreed—as had the *Dailey*

court—as a matter of "general policy and reasoning" that such arrangements might comport with the principles of due process, the court did not resolve the case on that basis since "[t]he government made no such promise here and we would not condone such an agreement" (Pet. App. 17a). Thus, as a factual matter, the court of appeals determined that the arrangement in this case was not significantly different from the arrangement in *Dailey* or the arrangements in the great majority of cases in which fees are paid based on an evaluation of an informant's performance in an investigation.

Similarly insubstantial is petitioner's claim that Montaner's testimony was subject to exclusion because the informant's arrangement with the government was not reduced to writing. As the court of appeals correctly noted, while a written agreement was suggested "as a better safeguard" in *Dailey,* it "is not a per se requirement" (Pet. App. 14a n.5). Here, Montaner and the agents were extensively cross-examined concerning the terms of their oral agreement. As both the court (*id.* at 18a) and Judge Aldrich in concurrence (*id.* at 41a) found, the record conclusively showed that Montaner understood that his compensation was dependent on his overall performance and not on the outcome of the case. The record therefore showed that the terms of the agreement were sufficiently clear—even though not reflected in writing—to satisfy the concerns expressed in *Dailey* and to afford the jury an adequate basis for assessing Montaner's credibility in light of his possible motivation to fabricate.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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